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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT FELIX ALVARADO,

Defendant and Appellant.

F077524

(Super. Ct. No. 17CR-05495A-RF)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Jeanne Schechter, Judge.

Matthew J. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill and Paul E. O'Connor, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Peña, J. and DeSantos, J.

Defendant Gilbert Felix Alvarado contends on appeal that remand is required for the trial court to consider whether to exercise discretion recently granted by Senate Bill No. 1393 (2017–2018 Reg. Sess.; SB 1393) to strike his prior serious felony conviction enhancement. The People respond that remand is unnecessary because the record clearly indicates the trial court would not have exercised this discretion. We vacate the sentence and remand. In all other respects, we affirm.

BACKGROUND

On September 3, 2017, the victim and her husband had recently moved into their house. The victim's father was at the house making home improvements. At about 11:00 a.m., defendant came to the door and asked for a carjack. The father said he did not have one. Ten minutes later, defendant returned to the door and asked if he could borrow an air compressor. The father lent him an air compressor. After an hour, the father got in his red pickup truck to go look for defendant. He found defendant with a car. He told the father he was using the air compressor and would return it soon. The father returned to the house and parked his truck, leaving the doors unlocked and the keys inside. When defendant returned with the air compressor, he asked the father if he could use the restroom. The father let him use the restroom. Then defendant asked the father to take him to Walmart. The father said no, he was not from the area and did not know where Walmart was. Defendant asked if he could wait outside for someone to pick him up. The father said yes. Defendant went outside and the father went inside. About 30 minutes later, the father went outside to get some tools from his truck, but the truck and defendant were both gone. The car defendant had been working on was still where it had been.

Defendant sold the father's truck, which had been reported stolen, to Michael V. for \$300 cash. Police later located the truck and brought the victim to take possession of it.

On September 5, 2017, the victim was in the house alone working on home improvements. She heard a loud, recurring thumping sound and thought her father had unexpectedly stopped by to do more work. Then she heard one of her alarm sensors beeping. She jumped up, knowing the beeping meant someone was inside the house. (The sensors also detected vibrations.) She went into the living room and saw defendant violently slamming his body up against the sliding glass door that led to the backyard. Then he picked up a large rock and started throwing it against the glass. The victim was fearful because a stranger was violently trying to get into her house and she thought he would harm her. She also saw another person. She ran and grabbed her phone. She struggled to enter her code, then dialed 911 as she ran down the hall to the front door. As she ran, she heard glass shatter.

Once out of the house, the victim ran house to house, but no one would open their door. Finally, she found four construction workers a few houses away as she was hysterically talking to the 911 operator. The victim asked the workers to come with her because someone was inside her house. They agreed and returned to her house with her. A few of the workers ran ahead and a few jumped the wall into the victim's backyard. When the victim entered the house, she saw broken glass. There was blood in the kitchen, living room, and dining room. Missing from the living room were a circular saw and a television, still inside its box. The workers got on top of the wall and saw defendant walking on a sidewalk and waiting for a ride about 150 feet from the house. He was bleeding. A truck stopped, picked him up, and drove by the house. The truck stopped at the house and defendant got out of the truck's passenger side. He acted as if he wanted to start a fight with the workers, then he got back in the truck and left. When the truck made a U-turn, the police arrived and the workers pointed the officer to the truck.

Police Officer James Marshall, who responded to the house within a minute or so, saw the workers on the wall. They were pointing and yelling that a white pickup truck was involved. As Marshall watched the truck, it slowly drove toward him and the driver appeared to panic. When the driver rolled through a stop sign, Marshall initiated a traffic stop. Marshall noticed the passenger was opening his door and attempting to get out before the truck stopped, as if he would run. So Marshall drew his weapon and ordered the driver and passenger out. Eventually, the driver and passenger complied and were handcuffed. Defendant was holding a bloody rag or napkin. Blood was running down his arm and smeared on his clothing.

In a field show-up, the victim identified defendant and the other person as the men in her backyard.

The circular saw was found on top of the wall and the boxed television was found on the other side of the wall. Both had blood on them.

At the jail, defendant told Marshall, “ ‘It was about time for me to have another time out.’ ” When defendant saw someone wearing a large electronic tracking monitor, he told the officer “that he wasn’t going to be in trouble for what happened today and that he was going to get released on one of those and that he wasn’t going to have to do any time in jail.” The officer raised his eyebrows and said, “ ‘You think so?’ ” or “ ‘Is that how it’s going to go?’ ” Defendant shrugged his shoulders and said, “ ‘You already have my blood.’ ”

At trial, defendant testified on his own behalf. He explained that on September 3, 2017, he was driving around a neighborhood looking for construction work. He got a flat tire and stopped to work on the vehicle, but he had no jack or tools. He knocked on some doors and found the father, who let him borrow his air compressor. After about an hour, the father drove up and saw he was working on his car. Defendant could not get his tire

on the rim, so he returned the air compressor and asked to use the bathroom. Then he went outside and called his aunt for a ride. He started walking and she picked him up.

On September 5, 2017, defendant and a friend came back to fix the car, but it was gone. Defendant felt hurt and angry because he trusted the father to keep an eye on his car and everything in it. Defendant's personal belongings were inside—his Bible, clothes, and baby pictures. As defendant and his friend were driving out of the neighborhood, his friend was “kind of like antagonizing [him], like ‘Man, that’s messed up that he didn’t watch your car.’ ” Defendant got upset and “[his] anger got the best of [him].” He jumped out, looked for a rock on the ground, and threw it at the house. It upset him that the rock did not break the window. He hopped over the wall and ran and punched the sliding glass door. His friend started laughing at him, calling him weak. Defendant punched the window again and it broke. His hand started bleeding. He never entered the house. His friend grabbed a table saw that was in the backyard and put it on the wall. Defendant told his friend he would need help over the wall because he could not feel his hand. As defendant tried to get on the wall, he turned back and saw his friend reach inside the house and unlock and open the sliding glass door. The friend came out of the house dragging a box. Defendant asked him what he was doing. Defendant said he needed help getting over the wall, but his friend slid the box over the wall and told him to climb the wall on his own. The friend hopped over the wall and took off. Eventually, defendant was able to get over the wall and he ran to the vehicle. Then the police stopped them. Defendant was no longer in a rage; he was in shock because of his hand.

Defendant denied ever seeing Michael V. or selling him a truck.

On cross-examination, defendant admitted having prior convictions for breaking into someone's house and for breaking into and stealing from a business. He also testified that when he left the house, he told the father, “ ‘Can you please watch my car.

I'm going to come back and get it.' ” He wanted the father to go chase off anyone suspicious. He was upset when the car was gone: “Because I asked him to watch it. He seemed like a trustworthy guy. He was an older man. I figured he would watch the car for me.” Defendant denied taking the father’s truck and stated that Michael V. lied in court about buying the truck from defendant.

On March 8, 2018, defendant was convicted by jury trial of first degree burglary (Pen. Code, § 459;¹ count 1). The jury found true the allegation that someone other than an accomplice was inside the residence during the commission of the burglary (§ 667.5, subd. (c)), and that defendant had suffered a prior 2002 conviction for burglary within the meaning of the “Three Strikes” law (§§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)), which also qualified as a prior serious felony conviction (§ 667, subd. (a)). The jury found defendant not guilty of unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a); count 2).

On May 17, 2018, the sentencing hearing was held. The trial court declined to grant defendant’s *Romero*² motion to dismiss his prior 2002 “strike” conviction, stating:

“... I have reviewed everything, and I also had asked ... [for] the defendant’s transcripts of his testimony during trial, because I remember thinking during trial I was a little surprised at some of the testimony I was hearing.... I have to say in this case, this was really serious. And I think very terrifying to the victim. And I’m extremely concerned about it.

“He also has a prior—a prior first-degree burglary conviction, which I notice during his testimony he really downplayed. It sounds like he just took a deal, not really accepting responsibility, even for that one. And he does have a very long criminal history. And in order to deem somebody outside the spirit of the Three Strikes Law, I really have to find I think some extraordinary circumstances.

¹ All statutory references are to the Penal Code unless otherwise noted.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

“And while I commend the defendant for the work he is doing and I certainly hope he does continue that, I think that’s good. I think he has a long way to go. And I just don’t feel that based upon his background, his history, and his prospects, there are any extraordinary circumstances that would deem him to fall outside the spirit of the Three Strikes Law. So I am going to deny the Romero motion at this time.

“The other thing I want to point out. [Defendant] was also found—or the—on[e] of the enhancements was a [section] 667[, subdivision](a) prior, which the Court by law has no discretion on. He has to be sentenced to state prison on that. [¶] I wanted to point that out. So I just wanted [defendant] to understand that.”

The People argued for the upper term and defense counsel argued for the low term. The court imposed the midterm, first explaining at length, as follows:

“When I look at the facts of this particular offense, the victim was very vulnerable. I infer from everything that [defendant] induced the uncharged co-defendant to participate in this crime. And from the actual evidence that was produced in the case and that I actually recall from when both of them were in the underlying case where the case had been dismissed and refiled, it seems that from everything it was the defendant really in the position of leadership in this.

“And frankly, the testimony he provided contradicted all of the evidence that was presented in the case, including the independent witness that saw ... the uncharged co-defendant, driving the vehicle. And it was [defendant] in the back yard [*sic*] trying to get back over the fence. And I think he testified that he was waiving [*sic*] at him or doing something to get his attention, but he was coming to pick him up.

“I do think he’s engaged in violent conduct. That indicates a serious danger to society. There was a person present. And whenever there’s a person involved in the house, which is why the legislature allows the Court to use [it] as an aggravating factor because it does increase the danger significantly. It’s very fortunate nobody got hurt, including [defendant]. Because if that had been an armed person, he certainly could have been shot and seriously injured or killed. He has numerous prior convictions. He’s been to prison repeatedly. He’s performing very poorly on probation.”

The court agreed with defense counsel that the lack of physical harm to the victim was a mitigating factor, although she did suffer emotional harm. The court, however, disagreed with all the other mitigating factors suggested by defense counsel because defendant had suffered numerous felony convictions, had served prison terms, and had demonstrated an unwillingness to comply with the law. The court also noted it was deeply troubled that defendant took advantage of a good Samaritan, the victim's father, who let a complete stranger borrow his air compressor so he could supposedly fix his tire, and even let him into the house to use the bathroom. The court stated it believed defendant stole the father's truck when he left.

The court stated it was "really struck by how [defendant], even though he had already completed phase one of the reentry program in jail, he got on the stand" and "lied through his teeth." The court said, "And I think the jury saw it. I saw it. And it was really disappointing to hear." Furthermore, the court noted, defendant blamed the victim's father for not watching and protecting his car and belongings, blamed his friend for instigating everything and getting him riled up, and claimed it was never his intention to burglarize the home. The court stated: "That's just contrary to all of the evidence in the case. So I'm really disturbed by that. And I think [defendant has] a lot more work to do," even though he had made some commendable efforts.

Finally, the court stated:

"But I think under the facts of this case ... I'm really not seeing this as a low term case. I do want to give you credit for the work you are doing; so, I would choose the midterm of four years instead of the low term of two years. I think because of the work you're doing, I'm not going to choose the aggravated term, which if you hadn't done that, this easily could have been an aggravated case. But I do want to give you some credit for that. And I hope you don't get too discouraged. I hope that you will continue your programming at CDC because they offer a lot more now that you can take advantage of. And you have a lot more to do."

The court proceeded to impose the midterm of four years for the burglary conviction, doubled pursuant to the Three Strikes law, plus five years for the prior serious felony conviction under section 667, subdivision (a), for a total of 13 years in prison.

On May 17, 2018, defendant filed a notice of appeal.

DISCUSSION

When defendant was sentenced, the trial court had no power to strike the prior serious felony conviction enhancement imposed pursuant to section 667, subdivision (a), as the court noted. (See former § 1385, subds. (b), (c)(2), Stats. 2014, ch. 137, § 1.) SB 1393, which took effect on January 1, 2019, amended sections 667 and 1385 to provide trial courts discretion to strike prior serious felony conviction enhancements in the interest of justice. (Stats. 2018, ch. 1013, §§ 1, 2.) We agree with the parties that the law applies retroactively to defendant because his appeal was not yet final on the law's effective date. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

The People argue, however, that remand is unwarranted because the trial court's comments at sentencing, as laid out above, demonstrate the court would not have dismissed the enhancement even if it had possessed the discretion to do so. The People note that "resentencing is not required when 'the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement.'" (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425, citing *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand for the trial court to consider its new discretion to strike a prior strike allegation]; see also *People v. McVey* (2018) 24 Cal.App.5th 405, 419 [finding that remand for resentencing would serve no purpose '[i]n light of the trial court's express consideration of the factors in aggravation and mitigation, its pointed comments on the record, and its deliberate choice of the highest possible term for the firearm enhancement'.])" (Fn. omitted.)

A trial court's intention in this regard is easy to infer when the court states it would not strike an enhancement even if it could, or it imposes all upper terms and states the crimes deserve the greatest possible punishment. But most cases are not so clear. Here, the court found defendant's testimony unbelievable and voiced its deep disappointment in defendant's transparent lies and accusations. On the other hand, the court felt defendant's efforts since his arrest were sufficient to save him from the upper term. Under these circumstances, we cannot confidently say the court's comments clearly indicated it would not have struck the serious felony conviction enhancement if it could have done so. For this reason, we will remand for the trial court to consider whether to exercise its newly granted discretion to strike the five-year prior serious felony conviction enhancement. If the trial court strikes the enhancement, it shall resentence defendant. In selecting an appropriate sentence, the court retains its full sentencing discretion, except that it may not impose a term in excess of 13 years. (See *People v. Price* (1986) 184 Cal.App.3d 1405, 1413 [general rule is "a harsher penalty may not be imposed after a successful appeal"].) If the trial court does not strike the enhancement, it shall reinstate the sentence.

DISPOSITION

The sentence is vacated and the matter is remanded for the trial court to consider whether to exercise its discretion to strike the prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)). In all other respects, the judgment is affirmed.